United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-2069

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al.,

Plaintiffs-Appellees,

- against -

MICHAEL KERN, et al.,

Defendants-Appellants.

BRIEF OF
THE LEGAL AID SOCIETY
AMICUS CURIAE

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Preliminary Statement

The Legal Aid Society submits this brief as amicus curiae, with the written consent of all the parties to this appeal, in support of the order and decision rendered below by Judge Judd and in support of appellees' position in this Court.

The Interest of the Amicus Curiae

The attorneys of the Legal Aid Society represent the majority of persons accused of crime in the state courts of New York City, including most of the members of the plaintiff class. The Society's clients and their attorneys share an obvious and significant interest in the question that is before this Court,

namely, the adequacy of existing practices and procedures for determining whether an accused person will be permitted to retain his liberty pending the disposition of criminal charges against him.

The Position of the Amicus

The Society supports the positions taken by appellees in this Court as to the correctness on the merits of the relief granted by the lower court (Point I), the absence of any barrier to the granting of that relief arising from notions of federalism and the doctrine of comity (Point II), and the propriety of treating this action as one maintainable under the Civil Rights Act of 1871 (Point III).

Rather than elaborate upon the arguments that are ably presented on these points in appellees' brief, the Society submits this brief in order to acquaint the Court with the rather different perspective on bail practices in New York City which the Society has put forward in two cases brought on behalf of its clients over the past several years, first in the state courts, Bellamy v. Judges and Justices, 41 A.D.2d 196, 342 N.Y.S.2d 137 (1st Dep't), aff'd, 32 N.Y.2d 886, 346 N.Y.S.2d 812, remittitur amended, 33 N.Y.2d 632, 347 N.Y.S.2d 582 (1973), and now in the United States District Court for the Southern District of New York. Roballo v. Ross, No. 74 Civ. 2113 (MEL). Since aspects of these cases are mentioned in the opinion below (Op. at 17-18, 30, 34-36) and have been brought to this Court's

attention at numerous points in the appellants' brief (at 17, 28, 52, 57-60), and since the decision of this appeal will in all likelihood affect the course of the currently pending litigation, it seems desirable that the Court be more fully apprised of the nature of the claims with regard to bail that are being presented in the Southern District.

The Bellamy and Roballo Cases

Mindful of the numerous suggestions of this Court that relief from unconstitutional practices and procedures of state criminal courts ought preferably be sought in the state appellate courts, the Society in March of 1972 filed the Bellamy case in the Appellate Division, First Department. Bellamy was undertaken as a class action to declare unconstitutional certain procedural shortcomings of the state court bail determination process. Accompanying the complaint was a description of a lengthy study of court files which showed that those detained in lieu of bail were convicted more often and sentenced more harshly than those not so detained and, further, that the relationship between an accused's jail-or-release status and the outcome of the case appeared to be causal when a variety of other explanations were probed and discounted.

Without granting a hearing or oral argument, and somewhat more than a year after the suit was filed, the Appellate Division dismissed the Bellamy complaint on the grounds that the

suit was not a proper class action and in any event the bail system was constitutional. With regard to the study, the court observed:

> This, of course, is not a field for exact science, and we do the best we can in an imperfect world.
>
> 342 N.Y.S.2d at 140.

* * *

> Sydney Smith put it well when he quoted: "... nothing was so fallacious as facts, except figures."
>
> Oliver Wendell Holmes, Jr. in his "The Common Law" stated that the "life of the law has not been logic; it has been experience."
>
> ... To put it another way, "figures don't lie, but liars figure."
>
> 342 N.Y.S.2d at 144.

The Court of Appeals affirmed without opinion, 32 N.Y.2d 886, 346 N.Y.S.2d 812, indicating later that it had passed on the federal constitutional issues raised, 33 N.Y.2d 632, 347 N.Y.S. 2d 582. A writ of certiorari was not sought.

Upon the completion of the Bellamy suit, the Society undertook to replicate the bail study with a larger population (over 1200 Criminal Court cases) and with certain changes in sampling technique urged during the earlier litigation. The newer study, drawn from information contained in official court files and compiled by attorneys with paraprofessionals' assistance, took nearly half a year to complete. In the meantime, the Roballo suit was commenced in the Southern District of New York. The updated study, which once again seeks to

demonstrate the direct influence of pre-trial detention upon ultimate case disposition, has been submitted in the course of the Roballo litigation. The District Court has deferred consideration of the study pending its decision on defendants' motion to dismiss, which is being held sub judice pending the outcome of this appeal.

In both Bellamy and Roballo, the plaintiffs have sought to demonstrate the causal impact of the bail decision on the case outcome through computer-assisted statistical comparisons of large samples of criminal cases from New York County, employing the techniques of multivariate cross-tabular and regression analysis. In each study, the attempt is made to identify factors other than pre-trial status, such as seriousness of the crime charged, strength of the evidence, prior criminal record, etc., which might conceivably account for the observed disparities between the outcomes of the criminal cases of persons detained and of persons released on bail or personal recognizance. By holding each of these factors constant, individually and in combination, it can be determined whether any factor or combination of factors, other than the fact of pre-trial detention itself, can account for the disparities.

The Bellamy study was submitted to the District Court as evidence in this case, and is a part of the record on appeal. In addition, Dr. Eric Single, the designer of the studies, testified below that the findings of the Roballo study confirmed those of the earlier study that the bail decision was the most

significant of the identifiable factors affecting the outcomes of criminal cases (Op. 17-18).

Pretrial Detention as a Cause of Disparities in Outcome

In both Bellamy and Roballo, the Society has sought to demonstrate an empirical proposition with important constitutional implications. It is that the fact of pretrial detention, vel non, has a causal impact on the outcome of a criminal case. The constitutional implication of such a finding, in terms of procedural due process, is that since the bail issue so vitally affects the ultimate issue of the case, it is necessary that the bail-determination process be infused with greater procedural safeguards than now exist against hasty, ill-considered or arbitrary action.

Neither the Bellamy nor the Roballo study was made the basis of findings of fact in the court below (Op. at 34-36), in part at least because both were based on data only from New York rather than Kings County. The Society does not suggest, therefore, that they be treated as fact for purposes of this appeal. It is submitted, however, that they constitute significant evidence of the prejudicial effect of pretrial detention which merits a hearing in the federal courts, and which, if proven, would provide an additional factual basis for holding that substantial procedural guarantees in connection with the bail-setting decision are constitutionally required.

Furthermore, the two studies are an effort to measure

and demonstrate statistically a causal relationship that is already well known to defense lawyers, state court judges, and other close observers of the criminal courts. It is well established that accused persons detained while their cases are pending are convicted more often and, once convicted, are sentenced to prison more frequently than those released prior to disposition. See, e.g., Greenwood, Wildhorn, Poggio, Strumwasser & deLeon, Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective, 48-52 (Law Enforcement Assistance Administration, United States Department of Justice, 1973); Taylor, Stanley, DeFlorio & Seekamp, An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado, 49 Denver L.J. 232, 261-63 (1972) and 50 Denver L.J. 9, 36-39 (1973); Rankin, The Effects of Pre-Trial Detention, 39 N.Y.U.L.Rev. 641 (1964). This disparity of outcomes was properly found as a fact by the lower court (Op. at 22-23). One does not need a computer study to reach the conclusion that pre-trial detention is itself responsible for a substantial part of this disparity. The high probability of a direct causal relationship becomes evident from an analysis of the way in which criminal cases are disposed of in the courts of New York City.

The vast majority of convictions in the state courts involve a plea of guilty by the accused in return for a reduction in the charge, or a sentence promise, or both (Op. at 24-25). Without such plea bargains, the processes of criminal

justice would break down, for there is no possibility of giving a trial to more than a small fraction of all those accused of crime. In a system such as this, where both conviction and sentence are the result of administrative adjustment between the accused, the prosecutor, and frequently the judge, it is inevitable that the enormous difference in bargaining power between an accused who is confined in jail and one who is free pending trial will have a substantial impact on the ultimate dispositions of their respective cases. Justice Damiani in effect conceded the existence of a causal relationship between detention and guilty pleas in his testimony in this case (Op. at 24), and the District Court found that "prolonged confinement in unsatisfactory detention facilities certainly creates a pressure to plead guilty" (Op. at 60).

The accused who is released on recognizance or bail has little reason to plead guilty until the district attorney is actually ready to go to trial; the detainee, by contrast, is under extreme pressure to accept a plea or sentence offer from the first moment when the arraignment judge sets a bail that he cannot meet. Given the impossibility of trying the majority of criminal cases, the district attorney must offer acceptable pleas and sentences to most accused persons who are free on bail. Given the inability of detainees to obtain pre-trial release, most are ultimately induced by the uncertainties and the extreme unpleasantness of prolonged pre-trial confinement to accept whatever the prosecution is willing to offer, especially

as that offer approaches "time served." Furthermore, the accused who is detained is unable to demonstrate to the court that in the period during which the case has been pending he has become repentant, begun a course of rehabilitation, or otherwise shown his suitability for less harsh sanctions than might otherwise be imposed (Op. at 23).

Viewed from this perspective, then, it is apparent that the inequity inherent in a system of money bail is not limited to the loss of liberty prior to trial. It extends to, and puts in question the fairness of, the adjudication of guilt or innocence and the exercise of the sentencing power. Thus, the money bail system combines with the process of plea bargaining to create a two-tier system of criminal justice in which the detained accused is twice the loser.

The Constitutional Implications of the Causal Relationship Between Bail and Outcome

It is familiar law that ascertainment of the requirements of procedural due process necessitates a judicial weighing of competing interests. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). The bounds of due process are fixed by measuring "the extent to which [appellees] may be 'condemned to suffer grievous loss'" and determining "whether [their] interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

The demonstration of a causal relationship between pretrial detention and eventual conviction and sentence is highly relevant to this balancing test because it shows the drastic "extent to which [appellees] may be condemned to suffer grievous loss" because of summary and perfunctory bail procedures that lead to unnecessary detention of an accused. The conclusion that bail is outcome-determinative is a decisive argument in favor of increased procedural protections in the bail-determination process to protect against ill-founded and arbitrary decisions resulting in unjustified detention. The order below insures that such minimal protections will be afforded without unduly burdening the state judiciary.

Conclusion

For the reasons stated above, the order of the District Court should be affirmed.

Respectfully submitted,

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